

of the *de minimis* exception provided for in paragraph (a) of this section, will be deemed not to be a security-based swap dealer under section 3(a)(71) of the Act (15 U.S.C. 78c(a)(71)) and subject to the requirements of section 15F of the Act (15 U.S.C. 78o-10) and the rules, regulations and interpretations issued thereunder until the earlier of the date on which it submits a complete application for registration pursuant to section 15F(b) (15 U.S.C. 78o-10(b)) or two months after the end of the month in which that person becomes no longer able to take advantage of the exception.

(c) *Applicability to registered security-based swap dealers.* A person who currently is registered as a security-based swap dealer may apply to withdraw that registration, while continuing to engage in security-based swap dealing activity in reliance on this section, so long as that person has been registered as a security-based swap dealer for at least 12 months and satisfies the conditions of paragraph (a) of this section.

(d) *Future adjustments to scope of the de minimis exception.* The Commission may by rule or regulation change the requirements of the *de minimis* exception described in paragraphs (a) through (c) of this section.

(e) *Voluntary registration.* Notwithstanding paragraph (a) of this section, a person that chooses to register with the Commission as a security-based swap dealer shall be deemed to be a security-based swap dealer, and, therefore, shall be subject to Section 15F of the Act (15 U.S.C. 78o-10) and the rules, regulations and interpretations issued thereunder.

[78 FR 30751, May 23, 2013]

**§ 240.3a71-2A Report regarding the “security-based swap dealer” and “major security-based swap participant” definitions (Appendix A to 17 CFR 240.3a71-2).**

Appendix A to § 240.3a71-2 sets forth guidelines applicable to a report that the Commission has directed its staff to make in connection with the rules and interpretations further defining the Act’s definitions of the terms “security-based swap dealer” (including the *de minimis* exception to that definition) and “major security-based swap

participant.” The Commission intends to consider this report in reviewing the effect and application of these rules based on the evolution of the security-based swap market following the implementation of the registration and regulatory requirements of Section 15F of the Act (15 U.S.C. 78o-10). The report may also be informative as to potential changes to the rules further defining those terms. In producing this report, the staff shall consider security-based swap data collected by the Commission pursuant to other Title VII rules, as well as any other applicable information as the staff may determine to be appropriate for its analysis.

(a) *Report topics.* As appropriate, based on the availability of data and information, the report should address the following topics:

(1) *De minimis exception.* In connection with the *de minimis* exception to the definition of “security-based swap dealer,” the report generally should assess whether any of the *de minimis* thresholds set forth in paragraph (a)(1) of § 240.3a71-2 should be increased or decreased;

(2) *General security-based swap dealer analysis.* In connection with the definition of “security-based swap dealer,” the report generally should consider the factors that are useful for identifying security-based swap dealing activity, including the application of the dealer-trader distinction for that purpose, and the potential use of more objective tests or safe harbors as part of the analysis;

(3) *General major security-based swap participant analysis.* In connection with the definition of “major security-based swap participant,” the report generally should consider the tests used to identify the presence of a “substantial position” in a major category of security-based swaps, and the tests used to identify persons whose security-based swap positions create “substantial counterparty exposure,” including the potential use of alternative tests or thresholds;

(4) *Commercial risk hedging exclusion.* In connection with the definition of “major security-based swap participant,” the report generally should consider the definition of “hedging or

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mitigating commercial risk,” including whether that latter definition inappropriately permits certain positions to be excluded from the “substantial position” analysis, and whether the continued availability of the exclusion for such hedging positions should be conditioned on a person assessing and documenting the hedging effectiveness of those positions;

(5) *Highly leveraged financial entities.* In connection with the definition of “major security-based swap participant,” the report generally should consider the definition of “highly leveraged,” including whether alternative approaches should be used to identify highly leveraged financial entities;

(6) *Inter-affiliate exclusions.* In connection with the definitions of “security-based swap dealer” and “major security-based swap participant,” the report generally should consider the impact of rule provisions excluding inter-affiliate transactions from the relevant analyses, and should assess potential alternative approaches for such exclusions; and

(7) *Other topics.* Any other analysis of security-based swap data and information the Commission or the staff deem relevant to this rule.

(b) *Timing of report.* The report shall be completed no later than three years following the data collection initiation date, established pursuant to § 240.3a71-2(a)(2)(iii).

(c) *Public comment on the report.* Following completion of the report, the report shall be published in the FEDERAL REGISTER for public comment.

### DEFINITIONS

#### § 240.3b-1 Definition of “listed”.

The term *listed* means admitted to full trading privileges upon application by the issuer or its fiscal agent or, in the case of the securities of a foreign corporation, upon application by a banker engaged in distributing them; and includes securities for which authority to add to the list on official notice of issuance has been granted.

(Sec. 3, 48 Stat. 884; 15 U.S.C. 78c)

[13 FR 8179, Dec. 22, 1948]

#### § 240.3b-2 Definition of “officer”.

The term *officer* means a president, vice president, secretary, treasury or principal financial officer, comptroller or principal accounting officer, and any person routinely performing corresponding functions with respect to any organization whether incorporated or unincorporated.

[47 FR 11464, Mar. 16, 1982; 47 FR 11819, Mar. 19, 1982]

#### § 240.3b-3 [Reserved]

#### § 240.3b-4 Definition of “foreign government,” “foreign issuer” and “foreign private issuer”.

(a) The term *foreign government* means the government of any foreign country or of any political subdivision of a foreign country.

(b) The term *foreign issuer* means any issuer which is a foreign government, a national of any foreign country or a corporation or other organization incorporated or organized under the laws of any foreign country.

(c) The term *foreign private issuer* means any foreign issuer other than a foreign government except for an issuer meeting the following conditions as of the last business day of its most recently completed second fiscal quarter:

(1) More than 50 percent of the issuer’s outstanding voting securities are directly or indirectly held of record by residents of the United States; and

(2) Any of the following:

(i) The majority of the executive officers or directors are United States citizens or residents;

(ii) More than 50 percent of the assets of the issuer are located in the United States; or

(iii) The business of the issuer is administered principally in the United States.

INSTRUCTION TO PARAGRAPH (C)(1): To determine the percentage of outstanding voting securities held by U.S. residents:

A. Use the method of calculating record ownership in Rule 12g3-2(a) under the Act (§240.12g3-2(a)), except that your inquiry as to the amount of shares represented by accounts of customers resident in the United States may be limited to brokers, dealers, banks and other nominees located in:

(1) The United States,

(2) Your jurisdiction of incorporation, and